STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED March 22, 2012
v	No. 300076 Oakland Circuit Court
DENNIS BRUCE MEACHUM, Defendant-Appellant.	LC No. 2008-224267-FH

Before: SHAPIRO, P.J., and WHITBECK and GLEICHER, JJ.

PER CURIAM.

Defendant Dennis Meachum appeals his jury convictions of second-degree criminal sexual conduct (CSC II),[1] and assault with intent to commit sexual conduct involving penetration,[2] for his violent attack on an elderly woman inside her apartment. The trial court sentenced Meachum as a fourth-offense habitual offender,[3] to concurrent prison terms of 21 to 40 years. We affirm Meachum's convictions but remand for resentencing.

I. FACTS

A. THE ASSAULT

The complainant, at the time 88 years old, was living in alone in an apartment complex for seniors. On November 18, 2008, Meachum knocked on her door and asked if she had any groceries that she needed carried in. Meachum was the boyfriend of the former healthcare aide of the complainant's neighbor. Meachum had assisted the complainant with carrying in her groceries in the past.

After a brief conversation concerning the complainant's neighbor, Meachum asked the complainant if he could use her bathroom. The complainant allowed him to enter her apartment,

[1] MCL 750.520c.

[2] MCL 750.520g(1).

[3] MCL 769.12.

and Meachum went immediately toward the bathroom. When Meachum came out of the bathroom, he asked the complainant if she had a boyfriend. Complainant said that she did not, and Meachum responded, "Well, then you don't have anybody to pleasure you." At this point, the complainant told Meachum to leave. But Meachum did not leave and instead made comments about complainant's "titties" and "pussy." The complainant continued to tell Meachum to leave.

When the complainant attempted to move around Meachum to open the door, Meachum grabbed her from behind, put his hand over her mouth, and tried to unbutton her top. Meachum knocked the complainant to the floor. The complainant, who had prior knee surgeries, could not stand back up on her own. The complainant stated that Meachum then "lifted me up and then he kind of pushed me and then he knocked me down again." Meachum put his hand into the complainant's pants and underwear and made contact with her vaginal area, although he did not digitally penetrate her. Meachum knocked the complainant down again and left the apartment.

At trial, Meachum did not dispute that the complainant was sexually assaulted, but instead presented an alibi defense. The complainant was unsure of the exact time that the assault took place, but testified that it was between 1:00 p.m. and 1:15 p.m. On cross-examination, the complainant confirmed that the assault took place after 1:00 p.m. and before 1:15 p.m. She stated that the assault lasted "[t]en or fifteen minutes. No more than that." Phone records established that Meachum's girlfriend called her employer's office, located 2.21 miles from the complainant's apartment, at 12:35 p.m. and was told that Meachum was at the office dropping off paperwork for her. Meachum left the office by 12:43 p.m. Meachum's girlfriend testified that she spoke to Meachum at 12:53 p.m. and that he was driving a car and smoking a cigarette. However, the forensic examination of Meachum's cellular phone records listed the 12:53 call as a "missed call." Meachum's girlfriend stated that she could not explain why the call was listed as "missed." Meachum spoke to his girlfriend in a six-minute phone call at 1:11 p.m.

B. COMPLAINANT'S IDENTIFICATION

The complainant described her assailant to the police as wearing a blue "Michigan" jacket. When Farmington Hills Police Department Detective Steur spoke to the complainant, she gave her assailant's height as five foot nine and indicated that he had a shaved head. Detective Steur testified that he believed Meachum's height was listed on his driving record as five foot ten.

After her assault, the complainant went to the hospital. While at the hospital, Farmington Hills police detectives showed her a photo lineup. The photo array contained six pictures of Caucasian men with shaved heads. Meachum's picture was among those contained in the array. Farmington Hills Police Department Detective Amenson described the procedure for presenting a photo lineup:

> [W]ith every other lineup we've ever done on the back of the lineup here there's a set of instructions. We'll tell her, read the set of instructions. If you have any questions, let us know. Once you're done if you don't have a question, flip the lineup over, and take a look and see if you can identify anybody.

The complainant circled the photograph of Meachum and wrote her initials next to it. The photo lineup was admitted at trial without objection by defense counsel.

The complainant also identified Meachum in court as the man who came to the door on November 18. The complainant stated that she could recognize Meachum in court—despite his having grown a beard and having a full head of hair by the trial date—as the man who came to her door on November 18 because "the eyes" were the same.

C. MEACHUM'S PHONE CALL TO WILLIS

Seventy-three-year-old Shirley Willis was the complainant's neighbor who had received home health services from Meachum's girlfriend. Meachum drove his girlfriend to her home visits. Willis was a religious person and stated that she "called [Meachum] my brother like I call [his girlfriend] my sister and that meant brother and sister in Christ."

Willis testified that she had become familiar with Meachum from these visits. Willis testified that "[s]omewhere within probably a couple months or so" before the assault on the complainant, she received a phone call from Meachum. She was sure it was Meachum based on her prior contacts with him. She stated that Meachum

> called and said "this is your brother. I know it's been a long time since you had a man, so why don't you let me come over and we can sin together." And I started crying. I said "you interrupted my prayer." He said, "if I said anything to offend you, I apologize."

Willis also testified that Meachum knocked on her door and identified himself by name "a few weeks or a month" after the phone call. But Willis told Meachum she had company and did not open the door or otherwise actually observe Meachum.

While handling preliminary matters, the trial court ruled on the admissibility of Willis's testimony. The trial court determined that MRE 404(b) did not govern the admissibility of the phone call because "there was no act that was actually rendered to the other elderly woman." Instead, the trial court conducted a standard relevance analysis and determined that the phone call would be admissible for purposes of identifying Meachum and "some degree of evidence of intent and state of mind within an immediate time frame close to the allegations in this case." The trial court admitted the evidence, subject to the prosecution's ability to lay a proper foundation for the identification of the voice on the phone as Meachum's. The evidence appears not to have been subject to a limiting instruction.

D. SENTENCING

The trial court sentenced Meachum on November 2, 2009. After corrections, deletions, and amendments to the presentencing information report (PSIR), the trial court indicated that the corrected sentencing guideline range for Meachum was 50 to 200 months. Although the trial court did not state specifically on the record which offense was being scored, the PSIR indicates that the CSC II conviction was scored.

The prosecution and the probation department recommended an upward departure from the guidelines range. The trial court agreed and articulated its reasons for departure:

> The Court presided over the jury trial in this matter. I note for the record you have six felonies on your record, one misdemeanor.
>
> * * *
>
> The Court notes that this is the kind of crime that cannot be tolerated in a civilized society. We have an extremely vulnerable victim. A woman who luckily was not seriously injured physically, but as she has stated these are the kinds of injuries that are lifelong.
>
> I note that the detailed circumstances which were testified to, the prior contact with another elderly neighbor, and the nature of that contact coupled with your past convictions, potential for rehabilitation, punishment, and deterring others from committing simpler [sic] offenses, noting some of the statements that you made that are present within the report, there is no excuse for this kind of behavior.
>
> * * *
>
> When we look back at your prior convictions, they do seem to indicate an extremely predatory pattern. We have repeat offender behavior of a violent sexual nature. We have the details of the prior acts, which include on one occasion holding a woman at knife point, cutting her clothes off, digitally penetrating her, and then leaving her in the woods with her pants over her head to fend for herself.
>
> * * *
>
> In addition, we do have the fact that you were an absconder from parole and the details associated with this offense.
>
> Taking into consideration the vulnerability of this victim, and as I've indicated, your past record, potential for rehabilitation, punishment, and deterring others from committing similar offenses, the recommendation is a fair one and there is grounds for exceeding the guidelines.

Meachum now appeals.

II. SIMILAR ACTS EVIDENCE

A. STANDARD OF REVIEW

Meachum argues that the trial court erred in admitting Willis's testimony that he made a phone call to her where he propositioned her for sex. This Court reviews for abuse of discretion

a trial court's decision to admit or exclude evidence.[4] An abuse of discretion occurs if the results are outside the range of principled outcomes.[5] This Court reviews de novo "[a] preliminary issue of law regarding admissibility based on construction of a constitutional provision, rule of evidence, court rule, or statute[.]"[6]

B. LEGAL STANDARDS

MRE 404(b)(1) forbids the admission of "evidence of other crimes, wrongs, or acts" in order to prove "action in conformity therewith." However, a defendant's *statements* are not prior *acts* for the purposes of MRE 404(b).[7] "Rather, as a statement of a party-opponent, admissibility is determined by the statement's relevancy and by whether its probative value is outweighed by its possible prejudicial effect."[8]

Relevant evidence is admissible unless the probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, undue delay, waste of time, or needless presentation of cumulative evidence.[9] Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."[10] In a criminal case, because the prosecution needs to prove all elements of the offense charged beyond a reasonable doubt, "[t]he elements of the offense are always at issue" and "the prosecution may offer all relevant evidence, subject to MRE 403, on every element."[11]

Rule 403 determinations are best left to the trial court's contemporaneous assessment of the presentation, credibility, and effect of the testimony.[12] Balancing the probative value of offered evidence against its prejudicial effect requires a balancing of several factors, including

> the time required to present the evidence and the possibility of delay, whether the evidence is needlessly cumulative, how directly the evidence tends to prove the fact for which it is offered, how essential the fact sought to be proved is to the

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[4] *People v Feezel*, 486 Mich 184, 192; 783 NW2d 67 (2010).

[5] *Id.*

[6] *People v Jambor* (*On Remand*), 273 Mich App 477, 481; 729 NW2d 569 (2007).

[7] *People v Goddard*, 429 Mich 505, 514-515; 418 NW2d 881 (1988).

[8] *People v Milton*, 186 Mich App 574, 576; 465 NW2d 371 (1990).

[9] MRE 401, 402, 403; *People v Blackston*, 481 Mich 451, 461; 751 NW2d 408 (2008).

[10] MRE 401; see *People v Crawford*, 458 Mich 376, 388; 582 NW2d 785 (1998).

[11] *People v Mills*, 450 Mich 61, 69-70; 537 NW2d 909, mod on other grounds 450 Mich 1212 (1995).

[12] *People v Vandervliet*, 444 Mich 52, 81; 508 NW2d 114 (1993).

> case, the potential for confusing or misleading the jury, and whether the fact can be proved in another manner without as many harmful collateral effects.[13]

Evidence is not unfairly prejudicial merely because it is damaging.[14] The danger of unfair prejudice arises "where a probability exists that evidence which is minimally damaging in logic will be weighed by the jurors substantially out of proportion to its logically damaging effect[.]"[15]

C. APPLYING THE LEGAL STANDARDS

The trial court admitted Willis's testimony concerning Meachum's phone call after determining that the evidence was relevant to the identification of the complainant's assailant and to Meachum's intent and state of mind before the assault.

Meachum points to *People v Sabin*,[16] for the proposition that motive and intent are not legitimate reasons to use similar acts evidence. However, as Meachum acknowledges, *Sabin* involved a first-degree criminal sexual conduct (CSC I) prosecution. And CSC I, unlike CSC II, does not include the element of "sexual intent."[17] Therefore, while intent may not be relevant in a CSC I prosecution, it is relevant in a CSC II prosecution, as in this case, where the prosecution is required to prove a sexual purpose.[18]

Here, Meachum's telephone conversation with Willis was relevant for several reasons. First, the perpetrator's identity was the essential issue at trial, and Meachum's statement to Willis was relevant to that issue. Meachum's statement shows that he was willing to make blunt sexual statements to elderly women who lived alone. And, according to the 88-year-old complainant, Meachum asked her if she had a boyfriend and then commented, "Well, then you don't have anybody to pleasure you." He also made lewd comments about her body. Considering that Meachum made blunt sexual overtures to the complainant before assaulting her, his sexually suggestive remarks to Willis a few months earlier tended to prove that Meachum was the person making similar remarks to the complainant before she was assaulted. Therefore, Meachum's statement to Willis was relevant to the issue of identity.

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[13] *Blackston*, 481 Mich at 462.

[14] *Mills*, 450 Mich at 75.

[15] *Sclafani v Peter S Cusimano, Inc*, 130 Mich App 728, 735; 344 NW2d 347 (1983).

[16] *People v Sabin* (*After Remand*), 463 Mich 43, 68-69; 614 NW2d 888 (2000).

[17] *People v Szalma*, 487 Mich 708, 726; 790 NW2d 662 (2010).

[18] *Id.* MCL 750.20a(q) defines the phrase "sexual contact" as follows:

> [T]he intentional touching of the victim's or actor's intimate parts or the intentional touching of the immediate area of the victim's or actor's intimate parts, *if that intentional touching can reasonably be construed as being for the purpose of sexual arousal or gratification, [or] done for a sexual purpose . . . .*

Second, Meachum's statement to Willis was relevant to show his intent to commit the crimes. To prove that Meachum was guilty of CSC II, the prosecution had to prove that he engaged in sexual contact with the complainant through force or coercion that caused injury.[19] To show "sexual contact," the prosecution was required to show that Meachum intended to touch the complainant's intimate parts for the purpose of sexual arousal or gratification.[20] Thus, the prosecution had to prove that Meachum possessed an intent to touch the complainant for a sexual purpose. Although the primary issue at trial was identity rather than intent, the prosecution nonetheless bears the burden of proving every element of a crime beyond a reasonable doubt.[21] Evidence that Meachum made sexually suggestive remarks to another elderly woman a few months before the assault would assist the trier of fact in determining what end Meachum was attempting to achieve when he assaulted the complainant. Therefore, the evidence was also relevant to prove Meachum's intent.

Further, the danger of unfair prejudice did not substantially outweigh the probative value of Meachum's statement to Willis.[22] The evidence was not graphic or unnecessarily inflammatory and would not impermissibly evoke the passions of the jury. Willis's testimony did not show that Meachum had a tendency to commit violent sexual assaults, but merely showed that he was willing to make sexually suggestive remarks to elderly female women who lived alone. Such evidence did not unfairly prejudice Meachum. But this evidence, when considered in light of the circumstances of the assault, was highly probative of the identity of the perpetrator and helped prove that his contact with the complainant was of a sexual nature. Further, the prosecution presented a substantial amount of other circumstantial evidence that would allow a rational juror to conclude beyond a reasonable doubt that Meachum committed the assault, suggesting that the jury did not give undue weight to the evidence.

In sum, we conclude that the trial court did not abuse its discretion by determining that the evidence was relevant to the identification of Meachum as the complainant's assailant and to Meachum's intent and state of mind before the assault.

III. IDENTIFICATION

A. PHOTO ARRAY

Meachum argues that he was denied due process by an unduly suggestive pretrial photographic lineup. Specifically, he argues that his photograph was taken at a much closer range than those of the other men pictured. However, Meachum waived this alleged error when defense counsel told the trial court that he had no objection to admission of the photo array.[23]

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[19] MCL 750.520c(1)(f).

[20] MCL 750.520a(q); *People v Russell*, 266 Mich App 307, 311; 703 NW2d 107 (2005).

[21] *Mills*, 450 Mich at 69-70.

[22] MRE 403.

[23] *People v Carter*, 462 Mich 206, 215-216; 612 NW2d 144 (2000).

Nevertheless, the photo array was not unduly suggestive. Meachum has not asserted that his physical features were obscured (which they were not), or disputed that the photo lineup contained photographs of six bald, Caucasian men of approximately the same apparent age (which it does). Looking at the array, it cannot be said that the framing of Meachum's head was so out of proportion to the others that it served to suggest his identity as the attacker. Indeed, photo nos. 3 and 4 are arguably of similar composition, and the size of Meachum's head is comparable to the individual pictured in photo no. 3.

B. IN-COURT IDENTIFICATION

Meachum further argues that the complainant's in-court identification lacked an independent basis for admission. This Court reviews for clear error a trial court's decision to admit identification evidence.[24]

The record establishes an independent basis for the complainant's in-court identification.[25] The complainant knew Meachum before the assault because he had carried groceries into her apartment on a few occasions. On the day of the assault, the complainant recognized Meachum when he came to her door, and they had a conversation before she allowed him to enter her apartment. The complainant had the opportunity to observe Meachum for 10 to 15 minutes at close range during the attack, and she identified him within a short time after the assault. The complainant accurately described Meachum's height and that he had a shaved head. The complainant never failed to identify Meachum when given the opportunity to do so, or identified anyone else as her attacker. There is also no evidence that, although traumatized after her attack, the complainant's mental state was in any way impaired before, during, or after the attack. Therefore, the trial court did not err in admitting the complainant's in-court identification.

IV. SENTENCING DEPARTURE

A. STANDARD OF REVIEW

Meachum argues that the trial court's departure from the sentencing guidelines was unwarranted because not all of the factors relied upon by the trial court were objective and verifiable, and because some of the factors that the trial court articulated were taken into account by the sentencing guidelines. This Court reviews a trial court's finding that a factor exists in support of a departure for clear error, whether the findings are objective and verifiable from the applicable sentencing guidelines range de novo, and the trial court's determination that the factors constitute substantial and compelling reasons for departure from the sentencing guidelines for an abuse of discretion.[26]

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[24] *People v Kurylczyk*, 443 Mich 289, 303; 505 NW2d 528 (1993).

[25] See *People v Gray*, 457 Mich 107, 116; 577 NW2d 92 (1998).

[26] *People v Babcock*, 469 Mich 247, 265; 666 NW2d 231 (2003).

B. LEGAL STANDARDS

A trial court may depart from the sentencing guidelines range for "substantial and compelling" reasons, if it articulates on the record the reasons for departure.[27] A trial court may not base a departure on a factor already taken into account by the prior record variables (PRV) and offense variables (OV) scored, unless the court finds that the characteristic was given inadequate or disproportionate weight.[28] The trial court must base its departure on "objective and verifiable" factors that are "of considerable worth in determining the length of the sentence and should keenly or irresistibly grab the court's attention."[29] To be objective and verifiable, the factors must be actions or occurrences external to the mind and must be capable of being confirmed.[30] A departure from the guidelines range must render the sentence proportionate to the seriousness of the defendant's conduct and his criminal history, rendering the sentence imposed more appropriate to the offense and the defendant than a sentence within the guidelines range would have been.[31] "When fashioning a proportionate minimum sentence that exceeds the guidelines recommendation, a trial court must justify why it chose the particular degree of departure. The court must explain why the substantial and compelling reason or reasons articulated justify the minimum sentence imposed."[32] "When departing, the trial court must explain why the sentence imposed is more proportionate than a sentence within the guidelines recommendation would have been."[33]

C. APPLYING THE LEGAL STANDARDS

Meachum argues that the trial court was obligated to score him, and determine a minimum sentencing guidelines range, for both CSC II and assault with intent to commit sexual penetration. However, when a trial court imposes concurrent sentences for two offenses of different classes, the court is only required to score the crime having the highest crime class.[34] CSC II is a Class C felony, while assault with intent to commit sexual penetration is a Class D felony.[35] Therefore, the trial court was only required to score the guidelines range for CSC II.

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[27] MCL 769.34(3); *People v Buehler*, 477 Mich 18, 24; 727 NW2d 127 (2007).

[28] MCL 769.34(3); *People v Harper*, 479 Mich 599, 616-617; 739 NW2d 523 (2007).

[29] *People v Smith*, 482 Mich 292, 299; 754 NW2d 284 (2008).

[30] *People v Horn*, 279 Mich App 31, 43; 755 NW2d 212 (2008).

[31] *Smith*, 482 Mich at 318; *Babcock*, 469 Mich at 262.

[32] *Smith*, 482 Mich at 318.

[33] *Id.* at 304.

[34] *People v Mack*, 265 Mich App 122, 126-128; 695 NW2d 342 (2005); see MCL 771.14(2)(e)(*ii*).

[35] MCL 777.16y.

The trial court's stated reasons for departing from the recommended minimum sentence range of 50 to 200 months were (1) the extreme vulnerability of the victim, (2) his prior inappropriate contact with the elderly neighbor, (3) Meachum's pattern of predatory criminal behavior, (4) Meachum's low potential for rehabilitation, (5) punishment, (6) deterring others from committing similar offenses, and (7) that Meachum was a parole absconder.

The fact that Meachum was a parole absconder is objective, verifiable, substantial, compelling, and not taken into account by the sentencing guidelines,[36] as is the fact that Meachum failed to rehabilitate himself despite given several opportunities to do so.[37] Meachum could not be assessed any points under OV 13,[38] because his pattern of predatory felonies was interrupted by long prison terms that took them out of the five year-period required for scoring this variable.[39] It is true that Meachum was assessed the maximum 15 points for OV 10 because "predatory conduct" was involved.[40] However, it is also clear that Meachum took advantage of the complainant's agedness and physical vulnerability. Points could not be scored under OV 10 for these compiling circumstances. Accordingly, the trial court met its burden to articulate "substantial and compelling" reasons for departure from the sentencing guidelines recommendation.

However, this did not end the trial court's obligation. The trial court was also required to articulate why the substantial and compelling reasons identified justified the extent of the departure.[41] The trial court was obligated to explain why the sentence imposed is more proportionate to the offense and the offender than a different sentence would have been.[42] Because the trial court failed to address the issue of proportionality, we must remand for the required articulation or resentencing.

We affirm Meachum's convictions, but we vacate his sentence and remand to the trial court for an explanation of why the particular level of departure was warranted and for resentencing. We do not retain jurisdiction.

/s/ Douglas B. Shapiro
/s/ William C. Whitbeck
/s/ Elizabeth L. Gleicher

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[36] See *People v Schaafsma*, 267 Mich App 184, 186; 704 NW2d 115 (2005).

[37] *People v Geno*, 261 Mich 624, 636-37; 683 NW2d 687 (2004).

[38] MCL 777.43.

[39] See *People v Francisco*, 474 Mich 82, 86; 711 NW2d 44 (2006).

[40] MCL 777.40(1)(a).

[41] *Smith*, 482 Mich at 304, 318.

[42] *Id.* at 311.